

S.B. CIVIL WRIT PETITION NO.1828/2006

Gulam Mohd. @ Moonji.

VS.

Haji Mohd. and anr.

Date : 4.12.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.RK Thanvi a/w Mr.N Thanvi, for the petitioner.

Mr.IR Choudhary, for the respondent.

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Heard learned counsel for the parties.

The petitioner/defendant is aggrieved against the order dated 14.2.2006 by which the petitioner's application filed under Order 8 Rule 1 CPC for taking on record copy of agreement to sale and copy of notice was rejected by the trial court.

It appears from the facts of the case that on 6.1.2006, an issue was framed by the trial court whether the defendant is in possession of the suit property in pursuance of the agreement to sale as referred in para no.4 of the written statement. On this date itself, the alleged agreement was

submitted in the Court. The trial court rejected the petitioner's prayer for taking on the record the said agreement inspite of the fact that on the same day, the issue about the alleged agreement was framed on the basis of the pleading of the petitioner/defendant and the petitioner has already submitted the document in the trial court. The petitioner faced with this situation, submitted an application under Order 14 Rule 5 CPC on the next date and prayed that the alleged agreement for which the issue was framed by the trial court on 6.1.2006 may be taken on record and for that purpose, permission may be granted. The trial court vide order dated 14.2.2006, while relying upon the earlier order dated 5.1.2006, rejected the application and held that the document cannot be taken on record.

Learned counsel for the petitioner submitted that the Court itself has framed the issue and on the day, the issue was framed, the copy of agreement was produced on the record and when the court rejected the petitioner's prayer for taking on record, then the petitioner has no option but to file application seeking permission to produce the document in evidence. According to learned counsel for the petitioner, the order on the face

of it is illegal as has been passed under the impression that earlier the Court rejected the petitioner's same prayer and there is no change in the circumstances.

Learned counsel for the respondent/plaintiff vehemently submitted that the petitioner filed another suit which was for specific performance of contract on the basis of same sale agreement which was dismissed by the trial court on 26.3.2007. However, according to learned counsel for the petitioner, regular appeal has been preferred by the petitioner to challenge the said decree which is pending before this Court. Be it as it may be, according to learned counsel for the respondent, there is a mandatory provision under Order 8 Rule 1A(1) CPC which clearly provides that the defendant is required to submit his all documents along with the written statement and that too after giving copy of the document to the other party namely to the plaintiff in this case. That has not been provided by the petitioner and, therefore, the trial court rightly rejected the petitioner's prayer. It is also submitted that the things which cannot be done directly, cannot be permitted to be done indirectly and particularly in violation to the strict statutory provisions.

Learned counsel for the respondent submitted that, therefore, there is no illegality in the impugned order.

Learned counsel for the respondent further submitted that once a suit on the basis of same document has been dismissed by the trial court, then the petitioner cannot prove the agreement to sale which was not found trustworthy in the petitioner's own suit which was decided earlier.

I considered the submissions of learned counsel for the parties and perused the reasons given by the trial court in two orders dated 5.1.2006 and 14.2.2006.

So far as the earlier decision given by the trial court in the petitioner's own suit no.38/2007 filed for specific performance of contract is concerned, the finding of said suit is under challenge and has not become res-judicata. The trial court itself has framed the issue with respect to the agreement on the basis of the plea taken by the defendant in the written statement and before that issue was framed and on the date the issue was framed, copy of the agreement was produced by the defendant. Even if the document

was not produced with the written statement, the Court was not helpless in not granting permission under Order 8 Rule 1A(3) CPC which clearly provides that a document which ought to be produced in the Court by the defendant but is not so produced shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit. This provision empowers the Court to grant permission. In the facts of the case, the order of the trial court is absolutely perverse and has been passed without examining Order 8 Rule 1A(3) CPC. The document is not irrelevant as that was not the view of even the trial court. The document was relevant and, therefore only, the issue was framed by the trial court on the basis of the plea taken by the defendant in the written statement and having foundation, the same agreement. In view of the above reason, the order of the trial court cannot be sustained.

Learned counsel for the respondent submitted that the original document has not been produced in the Court. So far as this objection is concerned, I do not find any merit in this objection in view of the fact that the copy of the document, if would be found inadmissible in

evidence, for want of original, then that can be taken note of and considered by the trial court at the subsequent stage. For the purpose of Order 8 Rule 1A(3) CPC, if the copy was submitted with respect to the document which is the subject matter in an issue framed by the trial court, I do not find that on technical ground, this copy should have been refused. It is always expected and the Court may require from the party to produce the original so that it may be taken on record. The trial court could have given opportunity to the defendant to produce the original also and also could have deferred the decision on the application seeking permission to produce the document but in procedural matters, the Court should not act hypertechnically so as to result in multiplicity of proceedings. The trial court should have done on 5.1.2006 itself and could have asked for production of the original document and could have asked on 14.2.2006 and thereafter could have passed appropriate orders so as to avoid multiple orders.

In view of the above discussion, this writ petition is allowed, the order of the trial court dated 14.2.2006 is set aside and the application of the petitioner is allowed under Order 8 Rule 1A

(3) CPC and the document is taken on record. Now the trial court may proceed in accordance with law.

(PRAKASH TATIA), J.

S.Phophaliya